

1982

# Robert S. Fredericksen v. Knight Land Corp. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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ROBERT S. FREDERICKSEN, aka :  
ROBERT S. FREDERICKSON, :  
Appellant, : BRIEF OF APPELLANT  
vs. : Case No. 18131  
KNIGHT LAND CORPORATION, :  
a Corporation, :  
Respondent. :

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BRIEF OF APPELLANT

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ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SUMMIT COUNTY, STATE OF UTAH  
THE HONORABLE PETER F. LEARY, PRESIDING

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Clerk, Supreme Court, Utah

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## TABLE OF CONTENTS

	<u>Page</u>
I. NATURE OF THE CASE . . . . .	1
II. DISPOSITION IN LOWER COURT . . . . .	1
III. NATURE OF RELIEF SOUGHT ON APPEAL . . . . .	2
IV. STATEMENT OF FACTS . . . . .	2
VI. ARGUMENT . . . . .	7
A. APPELLANT'S CONTRACTUAL RIGHT TO RECEIVE PROPERTY FROM RESPONDENT SHOULD BE ENFORCED . . . . .	7
1. If 129.4 acres are not presently available, Appellant has a right to money damages equal to the fair market value of the unavailable acreage at Jeremy Ranch . . . . .	10
2. Appellant's claim for land or fair market value thereof is not barred by the statute of limitations . . . . .	12
B. APPELLANT IS ENTITLED TO MONEY DAMAGES FOR BREACH OF CONTRACT . . . . .	14
1. Appellant's claim for \$20,000.00 plus ten percent thereon is not barred by the statute of limitations . . . . .	15
2. Any potential disabling statute of limitations tolled with Respondent's payment to Appellant's co-obligees under the subject Agreement . . . . .	17
3. Even if applicable, the statute of limitations would bar only a portion of Appellant's claim . . . . .	18
C. APPELLANT IS ENTITLED TO INTEREST AT THE LEGAL RATE ACCRUING SINCE THE MATURITY DATE OF THE OBLIGATION PLUS ALL COURT COSTS INCURRED INCLUDING A REASONABLE ATTORNEY'S FEE . . . . .	24
VI. CONCLUSION . . . . .	26

## AUTHORITIES CITED

### Page

#### Cases:

<u>Allen v. Miller</u> , 84 N.W. 2d 571 (N.D. 1957) . . . . .	24
<u>Bank of America Trust &amp; Savings Ass'n. v. McLaughlin</u> , 152 C.A.2d 911, 313 P.2d 220 (1957) . . . . .	22
<u>Bjork v. April Industries, Inc.</u> , 560 P.2d 315 (Utah 1977) . . . . .	24
<u>Bradford v. Alvey &amp; Sons</u> , 621 P.2d 1240 (Utah 1980) . . .	7
<u>Bunnell v. Bills</u> , 13 Utah 2d 83, 368 P.2d 597 (1962) . . .	11
<u>Commercial Security Bank v. Johnson</u> , 10 Utah 342, 173 P.2d 277 (1946) . . . . .	7
<u>Dixon v. Bartlett</u> , 176 Cal. 572, 169 P. 236 (1917) . . .	18
<u>Hiscock v. Hiscock</u> , 240 N.W. 50 (Mich. 1932) . . . . .	18
<u>Indian Territory Illuminating Oil Co. v. Rosamond</u> , 190 Okla. 146, 120 P.2d 349 (1941) . . . . .	21
<u>Kimball v. McCornick</u> , 80 Utah 189 259 P. 313 (1926) . . .	12
<u>Krause v. Spurgeon</u> , 256 S.W. 1072 (Mo. App. 1923) . . . .	21
<u>Lowe v. Harmon</u> , 115 P.2d 297 (Or. 1941) . . . . .	10
<u>Morgan v. Sorenson</u> , 3 Utah 2d 428, 286 P.2d 229 (1955) . . . . .	23
<u>Russell v. Park City Utah Corporation</u> , 29 Utah 2d 184, 506 P.2d 1274 (1973) . . . . .	23
<u>Smith v. Warr</u> , 564 P.2d 771 (Utah 1977) . . . . .	11
<u>State Tax Commission v. Spanish Fork</u> , 99 Utah 177, 100 P.2d 575 (1940) . . . . .	12
<u>Stewart v. Hansen</u> , 62 Utah 281, 218 P. 959 (1923) . . . .	11
<u>Stubbs v. Hemmert</u> , 567 P.2d 168 (Utah 1977) . . . . .	25

Statutes:

Utah Code Ann. §14-1-1 (1953, as amended) . . . . .	24
Utah Code Ann. §78-12-23 (1953, as amended) . . . . .	12
Utah Code Ann. §78-12-44 (1953, as amended) . . . . .	17

Other Authorities

16 A.L.R. 2d 902 . . . . .	24
22 Am. Jur. 2d, <u>Damages</u> , §47 (1965) . . . . .	11
51 Am. Jur. 2d, <u>Limitation of Actions</u> , §133 (1970) . .	21
71 Am. Jur. 2d, <u>Specific Performance</u> , §§116, 117 (1973) . . . . .	11
71 Am. Jur. 2d, <u>Specific Performance</u> , §126 (1973) . . .	10

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Respondent. :

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I. NATURE OF THE CASE

This is an action by Appellant on a written agreement made between the parties whereby, for compensation received, Respondent, Knight Land Corporation, promised to pay to Appellant, Robert Fredericksen, the sum of \$10,000.00 plus 10% thereon or, at Appellant's option, convey to him sufficient acreage of certain property known as Jeremy Ranch at a rate of \$85.00 per acre to satisfy said payment obligation.

II. DISPOSITION IN LOWER COURT

The Third Judicial District Court, Honorable Peter F. Leary, entered judgment of "no cause of action" against Appellant on all claims set forth in his Complaint based on a Stipulated Statement of Facts and various legal memoranda submitted by the parties.



### III. NATURE OF RELIEF SOUGHT ON APPEAL

Appellant asks this Court to reverse the judgment of the District Court and to remand for entering of judgment in favor of Appellant pursuant to the claims in his Complaint.

### IV. STATEMENT OF FACTS

On or about the 1st day of November, 1961, Respondent, Knight Land Corporation, as buyer, entered into an agreement with East Salt Lake Investment Company (ESLIC), as seller, whereby Respondent was given the option to purchase approximately 16,500 acres of land known as the Jeremy Ranch (R. 231). Pursuant to said agreement, Respondent took possession of the entire Jeremy Ranch property, received the right to purchase said property for \$1,400,000.00, and agreed to make annual installment payments to ESLIC toward satisfaction of said purchase price (R. 231, 244-264). However, Respondent did not hold nor could it deliver title to any of the property to any other party until money was received by ESLIC sufficient to release a portion of the property (R. 59).

Sometime prior to the 31st day of December, 1963, Appellant contributed \$10,000.00 to and became a limited partner in a partnership known as Huntington Park Investment Company. Said partnership entered into an agreement with Respondent whereby the Partnership would make the downpayment on Respondent's contract with ESLIC and pay by installments certain sums to Respondent as consideration for conveyance from Respondent of approximately

5,000 acres of Jeremy Ranch. After making the required down payment, the Partnership defaulted in its agreement with Respondent (R. 231-232).

On the 31st day of December, 1963, Respondent entered into a written Agreement with Appellant and other members of the Partnership by the terms of which Appellant agreed to release his interest in and to the Jeremy Ranch property, and Respondent agreed to pay to Appellant the sum of \$10,000.00 together with 10% thereon (R. 233). A copy of said Agreement was received in evidence, attached to the Stipulation of Facts (R. 276-285). Said Agreement provides, inter alia: That Appellant had "individually" paid to Respondent \$10,000.00; that Respondent promised to repay that sum together with 10% thereon from "50 percent of the gross profits actually realized by Knight from the resale of lands acquired by Knight from the Jeremy Ranch"; that "all sums received by Knight from the resale of any of the Jeremy Ranch land in excess of \$85.00 per acre shall be considered to be gross profits"; that Appellant acknowledged familiarity with the terms of Respondent's contract with ESLIC because of which Appellant's right to repayment was conditioned upon the payments to ESLIC being kept current allowing the release of resellable land to Respondent; that if all sums had not been advanced by Respondent by July 1, 1968, Appellant "may request Knight to convey . . . sufficient of the acreage theretofore released to Knight . . . at the rate of \$85.00 per acre to satisfy and discharge any remaining unpaid balance"; and that any breaching party thereto should pay all court costs and a reasonable

attorney's fee incurred for enforcement of the agreement (R. 276-285), Sections 1, 2, 3, 8, 16).

Between the 31st day of December, 1963 and the 8th day of May, 1970, there were a number of sales of the land by Respondent, all of which were for more than \$85.00 per acre. Said sales were necessitated by the annual payments due under the ESLIC agreement. Each year, only so much property was released and sold as would provide Respondent with sufficient funds to meet the annual obligation. All proceeds from the said sales were completely exhausted by costs of sales or in satisfaction of the ESLIC obligation (R. 239). In fact, there were no proceeds received by the Respondent from any of these sales which were not required by ESLIC as a condition to the release of the sold property. In each instance of sale, the deed either went directly from ESLIC to the third-party buyer or was transferred through Respondent immediately to the third-party buyer, and the money similarly was transferred either directly from said buyer to ESLIC, or through Respondent immediately to ESLIC. Respondent did not ever have control of the proceeds of said sales, nor could it deliver title to the released properties to Appellant (R. 59, 236).

On the 8th day of May, 1970, Respondent entered into a written agreement with Emigration Land Company (Emigration) by the terms of which Respondent sold on contract all of its interest in Jeremy Ranch for the sum of \$2,100,000.00. The remaining acreage was approximately 12,500 acres. Pursuant to

that agreement, Respondent received the sum of \$500,00.00 as downpayment on or about the date of execution of the contract and payments of \$75,000.00 in 1971 and 1972. In 1973, Respondent discounted the balance of the purchase price which was thereupon paid in full (R. 237-238).

Upon receipt of the \$500,000.00 downpayment from Emigration pursuant to the aforementioned agreement of sale, Respondent had, for the first time, more proceeds than were required to pay to ESLIC on the option obligation (R. 59, 60). However, the subject Agreement with Appellant allowed Respondent to "retain the first \$85.00 per acre paid" on each sale before any gross profits would be realized (R. 277, Section 2(c)). Appellant was only to be paid out of 50 percent of the gross profits of each sale. Furthermore, Respondent had no title to any of the property until October, 1974, at which time Emigration transferred 10 acres to Respondent in final settlement of the contract balance (R. 55).

Neither Appellant nor any other partners of the Partnership received any sums of money or any land from Respondent pursuant to the subject Agreement prior to the year 1973 (R. 194, paragraph 1(x)). In 1974, former partners of Appellant, also parties to the subject Agreement, were paid certain sums of money and given land by Respondent for settlement of a civil action filed by those individuals on the subject Agreement (R. 233-234, paragraph 5(a-d)). Appellant asserted before the Court herein that prior to said settlement, he had been encouraged by Respondent's agent, James L. Knight, not to become a party to

that lawsuit and was verbally assured that he would be paid (R. 332).

After numerous attempts to receive satisfaction of the contractual debt and subsequent to a period of convalescing from a severe heart attack, Appellant caused a written demand to be served upon Respondent on the 7th day of February, 1978. A copy of said demand was received in evidence, attached to the Stipulation of Facts (R. 324-327). In said demand, Appellant exercised his contractual option to request payment in the form of land as provided in the subject Agreement (R. 41, paragraph 20). Appellant at all times performed all of the stipulations, conditions, and agreements stated in the subject Agreement in the manner therein specified. However, Respondent refused either to pay the sum of \$10,000.00 together with 10% thereon or to convey to Appellant sufficient acreage to discharge the indebtedness.

On the 20th day of March, 1978, Appellant filed this action in the Third Judicial District Court in and for Summit County against Respondent praying for conveyance of property, or in the alternative, for repayment of the \$10,000.00 plus 10% thereon. Pursuant to stipulation of the respective counsel, a joint Stipulation of Facts was submitted to the Court (R. 231-327) followed by various memoranda of law and argument. The parties agreed to dismiss the action against James L. Knight individually. The District Court, Honorable Peter F. Leary, awarded Respondent a judgment of "no cause of action" against Appellant on all causes of action set forth in his Complaint, finding that said "claims are barred by the statute of



limitations" (R. 387-388, 391-396). Appellant appeals from said judgment.

## V. ARGUMENT

### A. APPELLANT'S CONTRACTUAL RIGHT TO RECEIVE PROPERTY FROM RESPONDENT SHOULD BE ENFORCED.

Section 3 of the subject Agreement begins:

If Knight has not reimbursed each of the Parties of the First Part in full for all sums advanced by him as aforesaid, plus 10 percent, by July 1, 1968, each or any of the Parties of the First Part may request Knight to reconvey to said requesting party sufficient of the acreage theretofore released to Knight from the Jeremy Ranch, at the rate of \$85.00 per acre to fully satisfy and discharge any remaining unpaid balance to said requesting party.

It does not, however, stipulate as to when this election should take place. When a provision in a contract requires that an act be performed without specifying any time, Utah law implies that it is to be done within a reasonable time under the circumstances. Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

A "reasonable time" is defined as "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty require should be done in a particular case." Commercial Security Bank v. Johnson, 10 Utah 342, 173 P.2d 277, 281 (1946). The only contractual requirements for Appellant's exercise was that he be not fully reimbursed by Respondent before July 1, 1968, and that he choose acreage from property

theretofore released. Thus, the option came into existence on that date.

As stipulated and admitted by Respondent, any attempted exercise by Appellant of the option prior to October, 1974 would have been undisputedly futile. Although title may have on occasion technically passed through Respondent, it had no alienable title to the property which it could give Plaintiff (R. 235, paragraph 6(b)). In May, 1970, Respondent became a beneficiary to a Trust Deed executed for the purchase of the property by Emigration (R. 238, paragraph 11). Respondent still had no legal title to the property such as could be transferred to Appellant in lieu of installment payments. The first date to which Respondent admits holding clear title to any of the property is approximately October, 1974, when it received 10 acres as a settlement with Emigration (R. 240, paragraph 19(a)). Although October of 1974 was the first time that Appellant could effectively exercise any portion of its option, sufficient acreage to satisfy the full obligation was yet unavailable.

Between 1970 and 1973, the Respondent was involved in a lawsuit with other parties to the subject Agreement. Those parties were also seeking payment in land or money pursuant to their rights under the Agreement. At that time, Appellant was encouraged by Respondent not to join in that action and was given assurances that he would be paid in full if he would be patient. In view of the facts that Respondent had no property until late 1974, that Respondent had persuaded Appellant not to join the earlier action promising full payment later, and that Appellant

was thereafter temporarily incapacitated by a serious heart attack, Appellant's demand of February 7, 1978 must be considered to be an exercise of that option within a reasonable time. The circumstances of this case dictate that a reasonable period must extend at least until the option holder is aware of either the ability of the obligor to perform or the obligor's intent not to do so. Any finding of the trial court to the contrary must be overturned as against the evidence.

Before the lower Court, Respondent construed Section 3 as giving Appellant the right to request property only from acreage released prior to July 1, 1968, regardless of when said option is exercised. The Section is not unambiguous, but Appellant asserts that its intended and more logical meaning is to allow Appellant to request property from acreage released prior to that request. The date of July 1, 1968 clearly indicates the date upon which the option is first exercisable, but does not limit the property which may be chosen. Appellant has a contractual right to select from property, "theretofore" released by ESLIC, in lieu of repayment from Respondent. That right first came into existence on July 1, 1968 and continued as an available option for a reasonable time.

Appellant has reason to believe that Respondent presently has or has had, during the pendency of this lawsuit, title to a certain amount of the subject property (R. 240, paragraph 19(b,c)). However, Respondent has not been willing to disclose the description of the specific property so held. Appellant,



thus, is entitled to have Security Title Company, the escrow holder, select from the acreage held by Respondent "sufficient of the acreage . . . to fully satisfy and discharge any remaining unpaid balance" to Appellant (R. 278, Section 3).

1. If 129 4 acres are not presently available, Appellant has a right to money damages equal to the fair market value of the unavailable acreage at Jeremy Ranch.

Respondent, at various times through this lawsuit, claimed that it presently owns few, if any, acres of the Jeremy Ranch property. If true, specific performance of the option provision in Section 3 of the Agreement would be impossible.

[S]ince equity does not undertake to do a vain and useless thing, and does not grant a decree of specific performance when it appears that the Defendant is unable to comply with his contract - no decree of specific performance will issue against a vendor in a land contract who has no title or interest in the land that he contracted to convey . . . .

71 Am. Jur. 2d, Specific Performance, §126 (1973).

Applying the rule to an option contract in Lowe v. Harmon, 115 P.2d 297, 302 (Or. 1941), the court said, "specific performance will not be deemed against an optionor who is not able, for want of title, to comply with the option contract."

In this case, however, Respondent admits to its present ownership of various interests in the Jeremy Ranch property but is allegedly unable to convey the full title or the full amount of proprrty which it contracted to sell (R. 240, paragraph 19(b,c)). Nevertheless, Appellant may elect to take any acreage to which Respondent currently holds title; the remainder of the

judgment will be left to remedies at law. 71 Am. Jur. 2d, Specific Performance, §§116, 117 (1973).

Remedies at law for the vendor's breach of a contract include the purchaser's loss of bargain plus any special damages foreseeable at the time of contract. The measure of damages for breach of contract is described as "the amount which would have been received if the contract had been performed, which means the value of the contract, including the profits and advantages which are its direct results and fruits." 22 Am. Jur. 2d, Damages, §47 (1965). This general rule was recognized by the Utah Supreme Court in Stewart v. Hansen, 62 Utah 281, 218 P. 959, 961 (1923), and applied to land sale contracts in Smith v. Warr, 564 P.2d 771, 772 (Utah 1977).

The damages caused by breach of contract are to be measured as of the date of the breach. Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597, 601 (1962). Appellant's demand for acreage was made in February, 1978 (R. 241, paragraph 20). It was not until that date that Respondent breached its promise to convey land. Since Respondent breached its contractual obligation to convey 129.4 acres to Appellant, and it contends that it does not now have any interest in the Ranch beyond a few acres, Appellant is entitled to any acreage currently owned by Respondent plus a money judgment for the fair market value as of the date of breach of the average remaining property such as would total 129.4 acres. Both Appellant and Respondent agree that as of February, 1978, the approximate value of the property in question was \$375.00 per acre (R. 241, paragraph 21).

2. Appellant's claim for land or fair market value thereof is not barred by the statute of limitations.

Respondent's only defense to this action is that the statute of limitations has lapsed and left Appellant without a legal remedy (R. 209). Section 78-12-23 of the Utah Code Annotated (1953, as amended) prescribes "an action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section" to be brought within six years. The statute of limitations begins to accrue on the date of the breach of contract, not the date on which it was signed or the date that performance provided therein might be completed.

This Court declared that the statute of limitations does "not begin to run until a suit or cause of action exists," Kimball v. McCornick, 80 Utah 189, 259 P. 313, 317 (1926). The Court dealt with the question as to when a cause of action accrues in State Tax Commission v. Spanish Fork, 99 Utah 177, 100 P.2d 575, 577 (1940):

Ordinarily, a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it. But when some controlling statute or a contract existing between the parties provides that an additional thing be done before action may be brought, such as a statutory provision that a return must be filed, or, as in some insurance contracts, a provision that suit may not be brought before a certain time after the claimed loss, the statute of limitations does not start to run until the time when suit may be maintained even though interest on the amount of the liability may begin to run from the time it is due and payable. (Emphasis added)

Accordingly, a cause of action on a contract debt does not accrue against the debtor until all of the requirements for payment to the creditor have been met.

Appellant's contractual right to request property in satisfaction of any outstanding amount due and owing from Respondent first arose on July 1, 1968 (R. 278, Section 3). The Agreement gave Appellant the option to choose from any property theretofore released by ESLIC. Each year from 1964 to 1967, Respondent secured a release of property from ESLIC. However, these annual releases were only for so much property as would garner proceeds on resale to pay each annual payment due to ESLIC. In fact, no releases would have been given at all if ESLIC were not given all proceeds (other than transaction costs). Transfer of the property through Respondent to the third party would not be made until and unless all proceeds were paid to ESLIC.

From 1964 through 1970, Respondent was unable to deliver title to any of the property to Appellant. There was no property which had been released by ESLIC but not simultaneously sold to a third party to meet the annual payment obligation on the 1961 Agreement (R. 236, paragraph 7). Appellant's right to select property first arose in 1968 since Respondent had not repaid him in full. But his election right was then hollow; there was no available land which had yet been released to Respondent.

Section 3 required an affirmative "request" to be made by Appellant to obligate Respondent to convey released property. Until such request was made, Respondent had no duty to transfer



title. A cause of action could not accrue until this last requirement was fulfilled by Appellant. The statute of limitations could likewise not begin to run until the cause of action accrued.

B. APPELLANT IS ENTITLED TO MONEY DAMAGES FOR BREACH OF CONTRACT.

In the event that Appellant's claim for property pursuant to Section 3 of the subject Agreement is conclusively found to be without merit, Appellant is entitled to money damages from Respondent for breach of contract.

Section 2 of the subject Agreement states:

2. As consideration of the release given by each of the parties of the first part, as set forth herein below, Knight agrees to pay to Security Title Company, Salt Lake City, Utah, as escrow holder for Parties of the First Part 50 percent of the gross profits actually realized by Knight from the resale of lands acquired by Knight from the Jeremy Ranch until each of the Parties of the First Part has been repaid the sum of money advanced by him, as is set forth above, plus 10 percent thereof, with said repayment to be made without interest. The term "gross profits", as used herein, shall be computed as follows:

(a) The cost of the land to Knight shall be considered to be \$85.00 per acre, which is the average per acre price Knight has contracted to pay for the entire 16,500 acres.

(b) All sums received by Knight from the resale of any of the Jeremy Ranch land in excess of \$85.00 per acre shall be considered to be gross profits.

(c) Knight will retain the first \$85.00 per acre paid as his cost of the land and 50 percent of the gross profits, to reimburse him for legal expense, development expense, sales expense, etc.

(d) The other 50 percent of the gross profit will be paid to Security Title Company of Salt Lake City, as escrow holder for the use and benefit of the

Parties of the First Part, and said escrow holder will be instructed to forthwith distribute pro rata all sums received by the escrow holder to Parties of the First Part. The monies so disbursed by the escrow holder shall be pro rated among the Parties of the First Part, so that each of said parties receives the same proportion of each disbursement as the money paid by him to Knight, as aforesaid, bears to the total money paid by all of the Parties of the First Part to Knight.

Respondent admits to the validity of the original debt and its nonpayment thereof (R. 239-240) and asserts the statute of limitations as its sole defense (R. 209).

1. Appellant's claim for \$10,000.00 plus ten percent thereon is not barred by the statute of limitations.

The subject Agreement provides that Respondent was obligated to repay to Appellant \$10,000.00 plus 10% thereon only out of the proceeds from the resale of Jeremy Ranch land (R. 282), Section 12). If no sales were made nor proceeds received, Respondent had no obligation to Appellant. Furthermore, Respondent's obligation to Appellant was only to be repaid out of "50 percent of the gross profits actually realized" by Respondent from each resale of land (R. 277, Section 2). Finally, Appellant was made to acknowledge the terms of Respondent's underlying contract with ESLIC, which required annual principal payments of \$160,000.00, and that unless Respondent made those payments, Appellant would receive no repayment except from pre-default gross profits (R. 279, Section 5).

Appellant could not maintain a suit for the breach of this contract until and unless (1) Respondent continued to make timely payments to ESLIC, (2) Respondent was able to resell portions of the land released by ESLIC, (3) proceeds from the resales would

include gross profits, and (4) those proceeds were not otherwise required to fulfill payment obligations to ESLIC. Until these requirements were met, Respondent was not obligated to repay Appellant, nor could Appellant enforce the contract through legal action.

The first proceeds free from obligation to the underlying contract with ESLIC were received in the sale of land to Emigration in 1970. All sales prior to that date were of only so much land as would be released by ESLIC to generate sufficient funds to allow Respondent to make its annual \$160,000.00 payments.

In the lower Court, Respondent asserted that because each resale of property, beginning in 1964, produced proceeds in excess of \$85.00 per acre, and since none of said proceeds were paid to Appellant, each resale also constituted an actual breach of contract and started the statute of limitations to run (R. 214-217). This contention ignores the clear intent of the contracting parties as evidenced in the Agreement. The paramount concern of the parties was to keep the contract with ESLIC current. Without the option on the land, neither party could enjoy anticipated profits. The apparent purpose of Section 5 of the Agreement was the acknowledgment of the primacy of that ESLIC obligation.

In May of 1970, Respondent received \$500,000.00 down and a schedule of installments for the outstanding balance of \$1,600,000.00 pursuant to the sale of 12,500 acres to Emigration.



This was the first receipt of proceeds by Respondent from the resale of land, which proceeds were not required to be immediately transferred to ESLIC. However, Appellant was not entitled to be repaid until gross profits on the sale were actually realized (R. 277, Section 2). According to the Agreement, Respondent was to "retain the first \$85.00 per acre and 50 percent of the gross profits" before Appellant was entitled to any payment. Defined as "sums received . . . in excess of \$85.00 per acre," no gross profits would be realized on the 1970 sale until \$1,062,500.00 was received from Emigration. Appellant, therefore, was not entitled to any repayment, nor could the Agreement be considered breached by Respondent until the first realization of "free" gross profits in 1973. Considering the date of actual breach, the institution of these proceedings in 1978 is well within the six-year statute of limitations.

2. Any potential disabling statute of limitations tolled with Respondent's payment to Appellant's co-obligees under the subject Agreement.

The earliest time a breach of contract by Respondent could have occurred was 1973 when "free" gross profits were first received. However, in 1974, two of Appellant's fellow investors were paid pursuant to the same contract. Utah Code Annotated §78-12-44, 1953, as amended, states that:

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the



period prescribed for the same after such payment  
acknowledgment or promise . . .

Payments pursuant to litigation were made to J. Kent Buehler and Richard D. Madsen in 1974, within the six-year statute of limitations of any possible breach (R. 233-234, 286-289). The payments were made by Respondent with a written settlement pursuant to the same Agreement that is contested in this case. Madsen and Buehler were partners with Appellant at the time the original debt arose, and all were treated as an entity entitled "Parties of the First Part" throughout the Agreement.

In Dixon v. Bartlett, 176 Cal. 572, 169 P. 236 (1917), a letter acknowledging a contract debt addressed to one partner was held sufficient to toll the statute against all the partners. In Krause v. Spurgeon, 256 S.W. 1072 (Mo. App. 1923), part payment to one of two joint holders of a note was sufficient to toll the statute of limitations against both holders. In Hiscock v. Hiscock, 240 N.W. 50 (Mich. 1932), payment to one of several co-owners of a mortgage which had been barred by the statute of limitations acted to revive the mortgage to all mortgagees.

The payments of cash and land accompanied by written settlements to Madsen and Buehler tolled the statute of limitations against Appellant. Thus, the period of limitation began anew in 1974. The action brought in 1978 was within the six-year period.

3. Even if applicable, the statute of limitations would bar only a portion of Appellant's claim.

Section 4 of the subject Agreement allows Appellant to "continue to receive his pro-rated share of the gross profits until he has been reimbursed if he has not been fully reimbursed by July 1, 1968." The alternative opinion was to recover sufficient land at the rate of \$85.00 per acre to satisfy his account. The language of this alternative requires a "request to reconvey" whereas the desire to continue in profit participation necessitates no such notice. No request was made by Appellant prior to the 1978 demand, and Respondent apparently assumed Appellant's election was to wait for payment from gross profits.

Section 13 of the Agreement anticipates Respondent selling its interest in the property "as an entity" and outlines Appellant's rights in such a sale. The sale to Emigration on May 8, 1970 was, indeed, the sale of Respondent's entire remaining interest in the Ranch and would apparently be subject to this section. However, the particular clauses of this section specify sales consummated by December 31, 1968:

(c) If Knight receives an installment sale contract which would be paid off in full before December 31, 1968, then Knight will, from each payment he receives, pay to First Parties (i.e., Fredericksen), as afore-said, the same proportion of the amount due to each of them as payment made to Knight bears to the total purchase price to Knight.

(d) If the installment payments are accepted by Knight extending the term of payment beyond 1969, then Knight will, nevertheless, pay First Parties in full from the funds so received by December 31, 1968. The annual payments shall be equal.

In the lower Court, Respondent contended that although inapplicable to the Emigration sale, subsection (d) offers

guidance in the interpretation of the intent of the parties to not "string out the payments for the Plaintiff." Certainly, the Agreement was not intended to indefinitely postpone payments to Appellant. Neither was the intent to force full payment to Appellant and his co-associates upon the initial installment payment which may have had a crippling effect on Respondent's cash flow. This factor is especially relevant in light of Respondent's admission that there were liens against the property exceeding the \$500,000.00 down payment made by Emigration in May, 1970 (R. 237, paragraph 10).

The only reasonable interpretation of Sections 2, 4, and 13 extended to 1970 and beyond is that Appellant should have the option to continue to wait for profits to be realized by Respondent; that receipts from the installment contract between Respondent and Emigration should be first used to recover its cost of land (\$85.00 per acre), and that only then should Appellant get his total amount due out of one-half the gross profits received. Thus, the controlling provisions for payments to Appellant would be Sections 2 and 4 continuing until gross profits were realized. Section 13 is inapplicable since it contemplates only an exception to Section 4 which did not arise. Nevertheless, Section 13 is useful as a tool in understanding the intentions of the contracting parties.

In the event that the first breach of Respondent's obligation to Appellant is found to have occurred in 1970 upon Appellant's sale to Emigration and receipt by Respondent of the

\$500,000.00 down payment, and it is further held that the prior payments to Madsen and Buehler did not toll the statute of limitations, it must also be found that the breach of contract was not singular but a repeated breach which created a new cause of action each time Respondent failed to pay out of the gross profits from each installment payment received. This reasoning appears consistent with Appellant's installment sale treatment of the 1970 sale (R. 220-222). The provisions of subsection 13(c) offer guidance for such an installment sale. Respondent had a duty to pay to Appellant the same proportion of the amount due him as Emigration's installment payment made to Responent bears to the total \$2,100,000.00 purchase price.

Installment sales are treated uniquely by statutes of limitation.

In case of an obligation payment by installments, the statute of limitations runs against each installment from the time when an action might be brought to recover it . . . [T]he rule that the statute of limitations begins to run against each installment of an obligation payable by installments only from the time the installment becomes due applies although the debtor has the option to pay the entire indebtedness at any time.

51 Am. Jur. 2d, Limitation of Actions §133 (1970).

Oklahoma Supreme Court recognized this principle in Indian Territory Illuminating Oil Co. v. Rosamond, 190 Okla. 146, 120 P.2d 349 (1941). The court held that a continuing covenant to make payments when breached gives rise to a cause of action each day breached.



The reason for the rule is while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach, but accrues and the statute begins to run as and when each breach occurs. Like an account not mutual in nature, but all on one side, the cause of action arises on the date of each item or breach, and the items within the statutory period of limitations do not draw after them those of longer standing.

120 P.2d at 352-53.

In Bank of America Trust & Savings Ass'n. v. McLaughlin, 152 C.A. 2d 911, 313 P.2d 220,223 (1957), the court ruled on a note payable in installments, several of which had not been paid and against which the statute had run. "Where money is payable in installments, the statute of limitations begins to run against the cause of action for the recovery of an unpaid installment at the time it is payable."

Section 4 of the subject Agreement states that if Appellant had not been fully reimbursed by July 1, 1968, he was entitled to "receive his pro-rated share of gross profits until he has been reimbursed." The sale to Emigration on May 8, 1970 was an installment contract. Appellant was thereby entitled to payments on a pro rata basis out of the 50 percent of the gross profits realized from each installment. If it is held that Respondent did not have a right to keep the first \$85.00 per acre, but that the payments to Appellant should be proportionate to Emigration's installment payments, the amounts due Appellant, based on \$11,00.00 due in 1970, are listed below:

## SCHEDULE OF RECEIPTS AND AMOUNT DUE

	Receipt. from Emigration	Percent	Amount Due
May, 1970	\$ 500,000.00	23.8	\$ 2,618.00
April, 1971	75,000.00	3.6	396.00
April, 1972	75,000.00	3.6	399.00
April, 1973 (Remainder)	1,449,000.00	69.0	7,590.00

Under this installment approach, even if the statute of limitations began to run for a breach of the contract by Respondent in 1970, this running would not affect the payments made in 1972 and 1973 since the Complaint was filed in March, 1978. Approximately \$7,986.00 is within the statute and accessible.

This determination of installment contract applicability is one which avoids a forfeiture by Appellant. The courts are usually eager to construe contracts to avoid forfeitures "which are regarded as odious to the law." Morgan v. Sorenson, 3 Utah 2d 428, 286 P.2d 229 (1955). In Russell v. Park City Utah Corporation, 29 Utah 2d 184, 506 P.2d 1274 (1973), this Court inferred that a party who seeks to enforce a forfeiture should be in strict compliance of forfeiture prerequisites. "[T]he general rule that one who seeks to invoke a forfeiture must strictly comply with the prerequisites thereof because forfeitures are not favored in the law." Although this is not a case of contractual forfeiture provisions, the principle should be extended. A court in equity will not construe a contract in favor of a party which is continually defaulted in its payments over one who has already given its consideration and is in danger of losing its entire cause of action.

C. APPELLANT IS ENTITLED TO INTEREST AT THE LEGAL RATE ACCRUING SINCE THE MATURITY DATE OF THE OBLIGATION PLUS ALL COURT COSTS INCURRED INCLUDING A REASONABLE ATTORNEY'S FEE.

The subject Agreement provides that Appellant receive his contribution of \$10,000.00 plus 10% thereon, but includes no interest. This Agreement and its obligations were obviously intended to be satisfied and fulfilled by December 31, 1968. It was not anticipated by the contracting parties nor is it reasonable to assume that Respondent should have had use of Appellant's \$10,000.00 for more than 17 years with only 10% added thereto.

Utah Code Annotated, §14-1-1 (1953, as amended) provides: "The legal rate of interest for the loan or forbearance of any money, goods, or things in action shall be six percent per annum." This statute was amended in 1981, but the amendment has no effect on this obligation. The majority of ruling jurisdictions have supported the rule that the rate of interest after maturity upon an obligation, reciting a certain rate expressly until maturity and silent as to the rate thereafter, is the legal rate. 16 A.L.R. 2d 902. In Allen v. Miller, 84 N.W. 2d 571 (N.D. 1957), the court held that a note payable without interest before maturity and silent as to interest after maturity bears interest at the legal rate from the date of default to date of payment or to date that judgment is entered.

In Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977), this Court commented on the availability of prejudgment interest:

25  
As to the allowance of interest before judgment, this Court has heretofore spoken, and the law in Utah is clear, viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment.

Appellant's right to repayment in cash matured in 1973 when Respondent had sufficient "free" gross profits to satisfy their contractual obligation. If the Court finds that the Respondent breached its contractual obligation, Appellant is entitled to interest on the \$11,000.00 accruing at 6% per annum from 1973 until the entry of judgment herein.

Appellant's right to property or the fair market value of same matured in February, 1978 when Appellant exercised his contractual option to demand 129.4 acres. If the Court decides that Appellant is entitled to a conveyance of property, he is also entitled to interest on the fair market value of that property as of 1978, from February, 1978 until the entry of judgment herein.

Utah law is clear that attorney's fees are chargeable to an opposing party only if there is a contractual or statutory liability therefor. Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977). The Agreement provides:

Should any of the parties breach this agreement, and the other be required to secure legal counsel to enforce it, the defaulting party agrees to pay all court costs incurred and a reasonable attorney's fee for the enforcement of the agreement.

(R. 284, paragraph 16).



Respondent has admitted breaching the Agreement (R. 239-241, paragraphs 14-17, 20). It is clear that Appellant was required to secure legal counsel to enforce the Agreement. If the Court finds in favor of Appellant on any of his claims, he is also entitled to a reasonable attorney's fee.

## VI. CONCLUSION

The District Court's ruling is contrary to law and equity. The District Court has, without legally valid grounds, undertaken to relieve Respondent from the burden of a lawful and valid contract.

Based on the analysis set forth above, Appellant is entitled, pursuant to the subject Agreement and his request of February 6, 1978, to a conveyance of 129.4 acres of the property known as Jeremy Ranch. Said conveyance is authorized by the 1963 Agreement at Appellant's option in lieu of payments on Respondent's acknowledged unpaid contractual debt. Appellant's request, therefor, was reasonably made under the circumstances and was the last act required of Appellant before Respondent's obligation to convey matured.

If Responent does not now have title to 129.4 acres of the subject property, it should be required to convey to Appellant so much of said property as is now in its ownership. The balance of his obligation should then be satisified by the payment to Appellant of the 1978 fair market value of so many of the 129.4 acres which are not so conveyed.

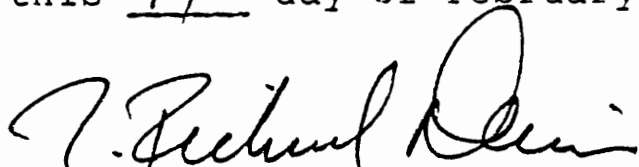
In the event that Respondent is not found to be obligated to convey property to Appellant, Appellant is entitled to the acknowledged contract debt in his favor in the amount of \$11,000.00.

Finally, only if the Court finds that Appellant is not entitled to a conveyance of property and that Respondent breached its contractual obligations giving rise to a valid cause of action prior to 1973, Appellant is entitled to the proceeds of each installment not lost by any alleged running of the statute of limitations.

In any event, Appellant is entitled to interest accruing at the legal rate since maturity of the obligation, all Court costs, and a reasonable attorney's fee incurred in these proceedings for the enforcement of the subject Agreement as provided in that Agreement.

The District Court's judgment should be reversed and remanded for entry of judgment in favor of Appellant.

RESPECTFULLY SUBMITTED this 17 day of February, 1982.

  
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## CERTIFICATE OF MAILING

I certify that I caused two copies of the foregoing Brief to be mailed to Edward W. Clyde and Ted Boyer of Clyde, Pratt, Gibb & Cahoon, 77 West 200 South, Salt Lake City, Utah 84101, this 17 day of February, 1982.

  
T. Richard Davis